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No. 1131

IN THE

Supreme Court of the United States

October Term, 1957

SALVATORE BENANTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE J. TODARO,
Counsel for Petitioner.
135 Broadway,
New York, New York.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction for violation of 26 U. S. C. §§5008 (b)(1) and 5642.

Opinion Below

The opinion of the Court of Appeals (App. A) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 6, 1957 (App. B). A petition for rehearing was denied on June 4, 1957 (App. C). The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

Question Presented

Whether evidence secured through wiretapping by state officers is admissible in a federal court.

Statute Involved

Act of June 19, 1934, c. 652, §605, 48 Stat. 1103, 47 U. S. C. §605:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving

any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Statement

An indictment in two counts was returned against petitioner in the United States District Court for the Southern District of New York on August 3, 1956 (R. 3)* The first count of this indictment charged possession of alcohol without tax stamps affixed and the second count charged transportation of such alcohol, in violation of 26 U. S. C. §§5008 (b)(1) and 5642.

The facts in this case are not in dispute and are fully set forth in the opinion of the court below. Petitioner and his brother frequented the Reno Bar in New York City (R. 8). The New York City police, believing that the Benantis were violating the state narcotics laws, obtained

* "R." refers to the appendix filed by petitioner in the court below.

a warrant authorizing them to tap the telephone of the Reno Bar (R. 12).

The police intercepted numerous conversations in which the Benantis were participants (R. 17-18). On May 10, 1956, they intercepted a conversation between petitioner and some other person, during the course of which it was stated that "eleven pieces" would be transported that night at a certain time and place (R. 14). Acting pursuant to this information, the police stopped and searched a car driven by petitioner's brother. Instead of narcotics they discovered eleven five gallon cans of alcohol without the tax stamps required by federal law (R. 14). They notified the Federal Alcohol and Tobacco Tax Division of the Treasury Department and this prosecution followed.

Concededly all of the evidence introduced against petitioner stemmed from the intercepted conversation. The trial judge denied petitioner's motion to suppress on the ground that no federal officer had participated in the interception, relying upon the case of *Weeks* v. *United States*, 232 U. S. 383, and on the further ground that the action of the state officers was authorized by state law (R. 28). The jury returned a verdict of guilty under both counts and petitioner was sentenced to imprisonment for eighteen months under each count, the sentences to run concurrently (R. 30).

The Court of Appeals stated that this case was "important and we think of first impression". It held that New York could not legalize what Congress had prohibited, and hence that the state officers violated §605 of the Federal Communications Act despite the fact that their action was authorized by state law. It went on to affirm peti-

tioner's conviction, however, on the ground that the same principle applies to evidence secured by wiretapping as to evidence secured by illegal search and seizure, namely, that the evidence is admissible so long as no federal officer participated in its illicit acquisition.

Reasons for Granting the Writ

Opinions in this Court have repeatedly reflected an awareness of the dangers implicit in prosecutions based on wiretapping. Those dangers appear in a new context here.

As recognized by the court below, this case presents an important and far reaching question in the field of federal criminal law which has never been resolved by this Court. Moreover, the holding of the court below is in square conflict with the views expressed by the Seventh and Tenth Circuits on this question.

1. This Court has frequently considered the admissibility of evidence secured by illegal search and seizure. It is now settled that the fruit of an illegal search and seizure by federal officers is inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383. It has likewise been held that the fruit of an illegal search and seizure by state officers is admissible in both state and federal courts. *Wolf* v. *Colorado*, 338 U. S. 25; *Lustig* v. *United States*, 338 U. S. 74; *Weeks* v. *United States, supra.* The reason for this distinction is very simple. The exclusionary rule enunciated in *Weeks* is applicable only to evidence secured in violation of the Fourth Amendment, and the Fourth Amendment applies only to action by federal officers.

This Court has held that the fruit of wiretapping by federal officers is inadmissible in the federal courts. *Nardone* v. *United States*, 302 U. S. 379, 308 U. S. 338. On the other hand, it has held that the fruit of wiretapping by state officers is admissible in a state court. *Schwartz* v. *Texas*, 344 U. S. 199. The opinion of Mr. Justice Minton in the *Schwartz* case clearly suggests that evidence secured through wiretapping by state officers is inadmissible in the federal courts. Referring to telephone calls intercepted by state officers, this opinion states, 344 U. S. at 201:

> "*Although the intercepted calls would be inadmissible in a federal court*, it does not follow that such evidence is inadmissible in a state court. Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court, *Wolf* v. *Colorado*, 338 U. S. 25, while such evidence, if obtained by a federal officer, would be clearly inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383." (Emphasis added.)

Neither the *Schwartz* case nor any other case decided by this Court, however, squarely decides whether evidence secured through wiretapping by state officers is admissible in the federal courts. As recognized by the court below, the search and seizure cases "touch the issue closely, but they do not decide it, for they did not deal with the statute before us". Unlike the Fourth Amendment, which applies only to action by federal officers, §605 of the Federal Communications Act applies to interception by *any person*. The court below was compelled to concede that this statute interdicts interception by state officers as well as others.

Evidence obtained through wiretapping by state officers, therefore, is obtained in plain contravention of a federal statute which prescribes a rule of evidence for the federal courts. The two situations hence present distinct legal problems.

The issue presented by this case is thus one of first impression and great importance. Concededly the use of wiretapping by state law enforcement officers is widespread. There is no way to determine the extent to which federal officers are making use of state wiretaps, but there is every reason to believe that such use is also widespread.

2. The decision of the court below is in conflict with the views expressed on this issue by the Seventh and Tenth Circuits. Both of these circuits have held that listening to a conversation on an extension telephone with the consent of one party does not amount to "interception" within the meaning of the statute. *Rathbun* v. *United States*, 236 F. 2d 514, certiorari granted, 352 U. S. 965; *United States* v. *White*, 228 F. 2d 832; see also *United States* v. *Bookie*, 229 F. 2d 130. In all of these cases, *state officers alone* listened to the conversations in question. And in all of these cases the courts made it clear that the evidence should have been excluded if the conduct of the officers amounted to "interception."

The truly disturbing feature of the decision of the court below is that the federal courts will now be continually plagued with wiretapping cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE J. TODARO,
Counsel for Petitioner
Office and P. O. Address
135 Broadway
New York 6, N. Y.

July, 1957.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 266—October Term, 1956.

(Argued March 7, 1957 Decided May 6, 1957.)

Docket No. 24427

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

SALVATORE BENANTI,

Defendant-Appellant.

Before:

MEDINA and WATERMAN, *Circuit Judges*, and GALSTON, *District Judge*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*.

Defendant appeals from a judgment of conviction of unlawful possession and transportation of eleven five-gallon cans of alcohol without tax stamps affixed thereto, in violation of 28 U. S. C. Sections 5008(b)(1), 5642. Affirmed.

Appendix A

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (John E. Roeder, Executive Assistant United States Attorney, and Maurice N. Nessen, Assistant United States Attorney, New York City, of Counsel), *for plaintiff-appellee.*

GEORGE J. TODARO, New York City, *for defendant-appellant.*

MEDINA, *Circuit Judge*:

Salvatore Benanti appeals from a judgment of conviction of illegal possession and transportation of distilled spirits without tax stamps affixed thereto, in violation of 28 U.S.C. Sections 5008(b)(1), 5642. The case is important and we think of first impression, as we are called upon to formulate a rule to govern the admissibility in a federal court of evidence obtained by state officers in violation of Section 605 of the Federal Communications Act, 47 U. S. C. Section 605, which prohibits any person "not being authorized by the sender" from divulging a communication intercepted by a wiretap. The search-and-seizure cases hereinafter discussed touch the issue closely, but they do not decide it, for they did not deal with the statute before us.

Appellant and his brother, Angelo Benanti, frequented the Reno Bar, on Elizabeth Street in New York City, and the two brothers made telephone calls from the Reno Bar. The New York City police, believing that one or both of

the Benantis were dealing in narcotics in violation of state law, obtained a warrant, in accordance with New York law, New York Const., Art. 1, §12; N. Y. Criminal Code §813-a, from the Supreme Court of the State of New York, authorizing them to tap the telephone of the Reno Bar.

On May 10, 1956, by listening in on a conversation over the telephone between appellant and some other person, the state police officers learned that "eleven pieces" would be transported that night at a certain time and place in New York City. Acting pursuant to this information, the police stopped a car driven by appellant's brother Angelo, but they found no narcotics. Instead, they discovered hidden in the car eleven five-gallon cans of alcohol without the tax stamps required by 26 U. S. C. Section 5642. The Federal Alcohol and Tobacco Tax Division of the Treasury Department was notified and this prosecution followed. It was not until the cross-examination of one of the police officers at the trial that the prosecutor or any of his assistants had any knowledge or suspicion of the fact that there had been a wiretap. It is clear beyond cavil that no federal officer participated in any way in the wiretap or even knowingly offered any evidence which was discovered as a result of the wiretap. But it is equally clear that but for the wiretap there would have been no basis for any prosecution whatever, as the apprehension of Angelo and seizure of the "eleven pieces" led to the discovery of appellant's participation in the violations of federal law for which he has been convicted; and the sequence of cause and effect is clear.

Accordingly, as soon as the wiretap was disclosed at the trial, counsel for appellant objected and in due course made

a proper and timely motion to suppress. The denial of this motion provides the major basis for this appeal.

Despite the warrant issued by the New York State court pursuant to New York law, we have no alternative other than to hold that by tapping the wires intercepting the communication made by appellant and divulging at the trial what they had overheard, the New York police officers violated the federal statute. *Nardone* v. *United States*, 302 U. S. 379, 308 U. S. 338; *Weiss* v. *United States*, 308 U. S. 321. Section 605 of 47 U. S. C. is too explicit to warrant any other inference,[1] and the *Weiss* case made its terms applicable to intrastate communications. The section provides:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

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[1] The New York cases do no deal with this point; they concern only the admissibility in evidence in the New York courts of wiretap evidence. *People* v. *Saperstein*, 2 N. Y. 2d 210, —— N. E. 2d ——, cert. denied —— U. S. —— (April 29, 1957); *People* v. *Feld*, 305 N. Y. 312, 113 N. E. 2d 440; *People* v. *Tieri*, 300 N. Y. 569, 89 N. E. 2d 526; *People* v. *Stemmer*, 298 N. Y. 728; *Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15, 68 N. E. 2d 854. Thus, in *Saperstein* the New York Court of Appeals declared that its position had been fully vindicated by *Schwartz* v. *Texas*, 344 U. S. 199. The holding in that case was that, "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged *in violation of* the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute." 344 U. S. at p. 202, emphasis added.

But it does not necessarily follow, as appellant assumes, that wiretap evidence is inadmissible. As was said in *Nardone* v. *United States*, 308 U. S. 338, at p. 340:

> Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land.

Appellant argues that the statute itself, as interpreted by the Supreme Court, prohibits the use of wiretap evidence. Although the language of the earlier decisions is consistent with this position, it is no longer a tenable one, for the Supreme Court has upheld convictions based on wiretap evidence in both state and federal courts. *Schwartz* v. *Texas*, 344 U. S. 199; *Goldstein* v. *United States*, 316 U. S. 114. Thus, it must be some other principle that requires the exclusion of wiretap evidence in those cases in which it is inadmissible.

It is not difficult to discover what that principle is; the Supreme Court has told us. In *Goldstein* v. *United States*, *supra*, the court said at p. 120:

> Although the unlawful interception of a telephone communication does not amount to a search or seizure prohibited by the Fourth Amendment [*Goldman* v. *United States*, 316 U. S. 129; *Olmstead* v. *United States*, 277 U. S. 438], we have applied the same policy in respect of the prohibitions of the Federal Communications Act * * *.

It becomes necessary for us, therefore, to ascertain the principle which governs the admissibility in a federal court

of evidence obtained by an unconstitutional search or seizure.

The leading case is *Weeks* v. *United States*, 232 U. S. 397, wherein the Supreme Court held that documents taken from the defendant's room by a United States Marshal without a warrant and not incident to a lawful arrest could not be introduced in evidence against him, because

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures * * * should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. [232 U. S. at p. 392.]

Subsequent cases have marked off the bounds of the doctrine, thereby illuminating the underlying principle. There is no rule that all evidence obtained by means of an unconstitutional search or seizure is inadmissible in a federal court. Thus, there is a requirement that the defendant, if his objection is to prevail, must have been a victim of the illegality. *Goldstein* v. *United States*, *supra*. Moreover, and more important for present purposes, it must appear that federal officers participated in the illegality or that the unlawful acts were done in their behalf. The cases so holding in the Court of Appeals are legion. E.g., *United States* v. *Moses*, 7 Cir., 234 F. 2d 124; *United States* v. *White*, 7 Cir., 228 F. 2d 832; *Jones* v. *United States*, 8 Cir., 217 F. 2d 381; *Fredericks* v. *United States*, 5 Cir., 208 F.

2d 712, *cert. denied* 347 U. S. 1019; *Serio* v. *United States*, 5 Cir., 203 F. 2d 576, *cert. denied* 346 U. S. 887; *Jaroshuk* v. *United States*, 9 Cir., 201 F. 2d 52; *Scotti* v. *United States*, 5 Cir., 193 F. 2d 644; *Symons* v. *United States*, 9 Cir., 178 F. 2d 615, *cert. denied* 339 U. S. 985; *Shelton* v. *United States*, D. C. Cir., 169 F. 2d 665, *cert. denied* 335 U. S. 834; *United States* v. *Diuguid*, 2 Cir., 146 F. 2d 848, *cert. denied* 325 U. S. 857; *Taylor* v. *Hudspeth*, 10 Cir., 113 F. 2d 825; *Rettich* v. *United States*, 1 Cir., 84 F. 2d 118; *In re Milburne*, 2 Cir., 77 F. 2d 310; *Gowling* v. *United States*, 6 Cir., 64 F. 2d 796; *Burkis* v. *United States*, 3 Cir., 60 F. 2d 452, *cert. denied* 287 U. S. 655; *Miller* v. *United States*, 3 Cir., 50 F. 2d 505, *cert. denied* 284 U. S. 651.

Although the Supreme Court has had many opportunities to upset this rule, it has not done so. On the contrary, in *Byars* v. *United States*, 273 U. S. 28, the Court said at p. 33:

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search or seizure.

Was this rule discarded or in effect superseded by the holding in *Wolf* v. *Colorado*, 338 U. S. 25, that the Fourteenth Amendment prohibited unlawful searches and seizures by state officials, a point which had not previously been authoritatively settled? We think clearly not. The issue was crucial, and dissenting Justices pointed out again

and again their view that only by ruling out evidence procured by an unconstitutional search and seizure in both state and federal courts could the constitutional prohibition, now applicable to the acts of state officials, be given vitality. But the rule requiring participation by federal officials as a basis for the exclusion of such evidence was again applied in *Lustig* v. *United States*, 338 U. S. 74, decided the same day as *Wolf* v. *Colorado*. And as recently as *Irvine* v. *California*, 347 U. S. 128, Mr. Justice Jackson, speaking for four Justices, said at p. 136, "Even this Court has not seen fit to exclude illegally seized evidence in federal cases unless a federal officer perpetrated the wrong." We have no alternative other than to take this to be the law today.

As remarked by Mr. Justice Frankfurter in the *Lustig* case, *supra*, at pp. 78-9: "The crux of the doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

The case of *Gambino* v. *United States*, 275 U. S. 310, deserves special mention. There no federal officer took part in the unconstitutional actions, but the evidence was excluded nevertheless, because the state police were acting solely to enforce federal law. The case highlights the principle applied by the federal courts in excluding evidence which has been obtained by unconstitutional methods. Clearly the purpose of the rule is to discourage such activities by overzealous law enforcement officers. It is thought that the federal courts by refusing to receive evidence ob-

tained in violation of the law of the land will cause persons seeking federal convictions to forego the use of such methods. See *Rea* v. *United States*, 350 U. S. 214, 56 Colum. L. Rev. 940. Of course, if an unconstitutional search or seizure was not undertaken in order to secure evidence to be used in a federal court, a rule of exclusion by such a court would serve no useful purpose, for the violation would have occurred in any event. Exclusion in such a case would merely needlessly hamper the enforcement of federal law. Hence, as we have seen, the federal courts do not exclude evidence of federal crimes incidentally obtained by state officers seeking to enforce state law, even though by methods violative of the Fourteenth Amendment, for, whatever we may think of the rule, it is now settled law that the Constitution does not render such evidence inadmissible in a state court. *Irvine* v. *California, supra; Schwartz* v. *Texas, supra; Wolf* v. *Colorado, supra.* Since, this being so, exclusion from a federal court would not deter such activities, the evidence is admissible.

We can find no tenable distinction in principle between the rule of policy governing the admissibility in federal courts of evidence illegally obtained by state officers through an unlawful search and seizure, without participation or collusion by federal officials, and the rule of policy which should govern the admissibility of evidence obtained by state officials under similar circumstances in violation of the federal statute against wiretapping. On the contrary, as Judge Learned Hand, speaking for this Court, observed in *United States* v. *Goldstein*, 2 Cir., 120 F. 2d 485, at p. 490, "it would be a curious result, if a violation of the

section were more sweepingly condemned than a violation of the Constitution." The Supreme Court in affirming, *Goldstein* v. *United States*, *supra*, pointed out the limited scope of the rule requiring the exclusion of unconstitutionally obtained evidence, and said, "We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act." 316 U. S. at p. 121. Apart from this authority, surely it cannot be that the violation of a federal statute calls forth implied sanctions more pervasive than those formulated by the Supreme Court to compel obedience to a constitutional mandate.

Appellant insists that the issue now before us has been decided in his favor in *Schwartz* v. *Texas*, *supra*, and he relies upon and misconstrues the following part of a sentence appearing at p. 203: "We hold that §605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof * * *." But the Court was only concerned in *Schwartz* v. *Texas* with the admissibility of such evidence in state court proceedings. The intercepted call in the case now before us would, we think, have been clearly not admissible if federal officers participated. To say that the rule of exclusion applies only to federal court proceedings is not to say that wiretap evidence given in violation of Section 605, will always and under all circumstances be excluded in every proceeding in a federal court. The question now before us was not passed upon in *Schwartz* v. *Texas;* nor do we find in Mr. Justice Minton's opinion the slightest hint that this question was given any consideration whatever.

Accordingly, we hold that Judge Walsh properly denied the motion to suppress.

The only other issue on this appeal is whether the trial judge abused his discretion in refusing to allow a continuance. There is no need to detail the facts. We are not persuaded that under the circumstances it was unreasonable to order the case to trial.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May, one thousand nine hundred and fifty-seven.

Present:

HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
Circuit Judges

HON. CLARENCE G. GALSTON
District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

SALVATORE BENANTI,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 4th day of June, one thousand nine hundred and fifty-seven.

Present:

HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
Circuit Judges

HON. CLARENCE G. GALSTON
District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

SALVATORE BENANTI,
Defendant-Appellant.

A petition for rehearing and for a stay of mandate having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that the petition for rehearing be and it hereby is denied.

Appendix C

Further ordered that the application for a stay of the issuance of the mandate be and it hereby is granted.

A. DANIEL FUSARO
Clerk